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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

NORTHWEST ENVIRONMENTAL )  
ADVOCATES, )  
 )  
Plaintiff, )  
 )  
v. )  
UNITED STATES ENVIRONMENTAL )  
PROTECTION AGENCY, et al., )  
 )  
Defendants, and )  
 )  
THE STATE OF OREGON, )  
 )  
NORTHWEST PULP AND PAPER )  
ASSOCIATION, )  
 )  
Intervenor-Defendants. )

Civil No. 05-1876-HA

UNITED STATES' MEMORANDUM IN  
SUPPORT OF UNITED STATES'  
MOTION FOR CLARIFICATION

## INTRODUCTION

The United States submits this memorandum in support of its Motion for Clarification regarding the Court's February 28, 2012 Opinion and Order ("Opinion and Order"). We respectfully seek clarification of the following three issues<sup>1/</sup>:

1. Does the Opinion and Order require EPA to: (1) take an approval or disapproval action under CWA Section 303(c) on Oregon's nonpoint source rules; or, instead (2) review those nonpoint source rules to determine whether a section 303(c) approval or disapproval action is required, and then take such action under section 303(c) that EPA determines to be required?

2. Under what legal test does the Opinion and Order require EPA to assess Oregon's nonpoint source provisions?

3. Does the Opinion and Order require EPA to take an approval or disapproval action under CWA Section 303(c) on Oregon's Internal Management Directive?

The first two questions relate to the Court's ruling on Oregon's nonpoint source provisions, which the Opinion and Order addressed at pages 8-18.<sup>2/</sup> The third question relates to Oregon's Internal

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<sup>1/</sup> The United States reserves its appeal and other rights related to the issues on which it seeks clarification and to those on which it does not seek clarification.

<sup>2/</sup> Plaintiff's briefing and the Opinion and Order focused on two sets of nonpoint source rules and an additional provision that addresses recurring activities of both point and nonpoint source dischargers. One set of nonpoint source rules includes OAR 340-041-0028(12)(e) - (h), which address forestry and agriculture on certain lands, and "other nonpoint sources." The other set of nonpoint source rules also addresses agriculture and forestry on certain lands. *See* OAR 340-041-0061(11) and (13). *See, e.g.*, Opinion and Order at 11, 12-13. The additional provision relates to whether certain recurring activities – rotating grazing pastures and agricultural crop rotations – will be considered "new or increasing discharges" that trigger antidegradation review. OAR 340-041-0004(4)(a), (b). *See, e.g.*, Opinion and Order at 12-13. Oregon's submission provided that such activities would not trigger antidegradation review "so long as they do not increase in frequency, intensity, duration or geographical extent." *Id.* To the extent that the provision related to point source discharges, EPA approved the provision. *See* AR 1 at 000029 ("EPA approves this provision because it is reasonable to conclude that recurring activities do not increase in frequency, intensity, duration, and geographical extent and are not new or increased discharges. Therefore, these recurring activities do not constitute a lowering and thus are not required to undergo tier 2 review."). Plaintiff did not challenge that approval. EPA did not act on the provision to the extent that it applied to nonpoint sources. *Id.*

Management Directive, which the Opinion and Order addressed at pages 32-33. The United States is unsure of the answers to these three specific questions, all of which relate to the relief that the Opinion and Order may require of EPA. Accordingly, the United States respectfully seeks the Court's guidance on these three issues.<sup>3/</sup>

### DISCUSSION

- I. Does the Opinion and Order Require EPA to: (1) Take an Approval or Disapproval Action Under CWA Section 303(c) on Oregon's Nonpoint Source Rules; or, Instead (2) Review Those Nonpoint Source Rules to Determine Whether a Section 303(c) Approval or Disapproval Action is Required, and Then Take Such Action Under Section 303(c) That EPA Determines to be Required?

Clean Water Act section 303(c) requires EPA to determine whether a state's new or revised water quality standard that is submitted to EPA either "meets the requirements" of the Clean Water Act or, instead, "is not consistent with the applicable requirements" of the Act. 33 U.S.C. § 1313(c)(3). If EPA determines that such standard meets the Act's requirements, then the standard is approved and "shall thereafter be the water quality standard for the applicable waters of that State." *Id.* If EPA determines that such standard is not consistent with the applicable requirements of the Act, then the standard is disapproved, and EPA must notify the state and specify the changes needed to meet the Act's requirements. *Id.*<sup>4/</sup>

Several portions of the Opinion and Order suggest that it requires EPA to approve or disapprove under CWA section 303(c) the state's nonpoint source provisions. For example, the Opinion and Order stated that "plaintiff is granted summary judgment on the First Claim for Relief." Opinion and Order at 18. The First Claim for Relief in Plaintiff's Second Amended Complaint alleged that, by not taking action on Oregon's nonpoint source provisions, EPA had

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<sup>3/</sup> Because the issues on which the United States seeks clarification relate to remedy issues, resolution of the Motion for Clarification may well be required before the parties can conclude their discussions regarding remedy under the Opinion and Order. *See* Opinion and Order at 51. Nonetheless, the United States anticipates that the parties will continue to confer regarding remedy issues, and make as much progress as possible, while the Motion for Clarification is pending.

<sup>4/</sup> CWA section 303(c) also specifies that, if the state does not adopt the changes specified by EPA, then EPA shall promulgate such standard. 33 U.S.C. § 1313(c)(3), (4).

violated its “mandatory duty under 33 U.S.C. § 1313(c)(3) and EPA’s regulations.” Second Amended Complaint, ¶ 132. The Opinion and Order also denied as moot Plaintiff’s Second Claim for Relief, which was plead in the alternative and alleged that EPA’s not taking action violated the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). Opinion and Order at 18; Second Amended Complaint, ¶ 142. In addition, the Opinion and Order referred to EPA’s “mandatory duty” and “nondiscretionary duty” to review the nonpoint source provisions. Opinion and Order at 8, 15, 17.

On the other hand, various text from the Opinion and Order suggests that it did not necessarily require EPA to approve or disapprove the nonpoint source provisions under CWA section 303(c), and instead required EPA first to determine whether the nonpoint source provisions must be approved or disapproved under CWA section 303(c), and then take such action as required. For example, the Opinion and Order does not hold that the nonpoint source provisions are water quality standards, *see, e.g.*, Opinion and Order at 12, 13, 14, 17, and states that the court’s ruling does not require EPA to exceed its authority under the CWA. Opinion and Order at 14, 17. In addition, the Opinion and Order stated that its holding was supported by *Florida Public Interest Research Group Citizen Lobby, Inc. v. EPA*, 386 F.3d 1070 (11<sup>th</sup> Cir. 2004). In that case, the Eleventh Circuit remanded the case for the determination of whether the state rule at issue had the effect of revising the water quality standards. *FPIRG v. EPA*, 386 F.3d at 1070, 1090-91.<sup>5/</sup> Further, in discussing EPA’s “nondiscretionary duty” to review the nonpoint source provisions, the Opinion and Order referred to the exercise of such duty “insofar as the provisions affect how, whether and when [Oregon’s water quality] standards apply to bodies of water polluted by nonpoint sources.” Opinion and Order at 17. Relatedly, the Opinion and Order stated that EPA was required to “review the effects of [the nonpoint source] provisions to ensure that they do not supplant, delay the implementation of, or in some other way undermine the application of Oregon’s standards to the state’s waterbodies.” *Id.* The United States is unsure whether the Court meant for that review to

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<sup>5/</sup> On remand, the district court deferred to EPA’s assessment of whether the state rule’s provisions constituted a new or revised water quality standard. *See Florida Public Interest Research Group Citizen Lobby, Inc. v. EPA*, No. 4:02cv408-WS, Order Granting Defendants’ Motion for Summary Judgment (N.D. Fla. Feb. 15, 2007) (Attachment 1 to U.S. Brf.) at 21-23.

entail an approval or disapproval decision under section 303(c) or, instead, a review under which EPA would determine whether a 303(c) approval or disapproval is required. These sections of the Opinion and Order suggest that the Court may have intended that EPA: (a) first review the nonpoint source provisions to determine whether 303(c) approval or disapproval is required; and (b) take a section 303(c) approval or disapproval action only on those provisions for which EPA determines that such section 303(c) action was required.

Accordingly, the United States respectfully requests that the Court clarify the first question set forth in its Motion for Clarification (and also set forth above).

II. Under What Legal Test Does the Opinion and Order Require EPA to Assess Oregon's Nonpoint Source Provisions?

The United States is unsure what legal test, if any, the Opinion and Order specifies for EPA's analyses of the nonpoint source rules, either to determine: (1) whether EPA is required to take an approval or disapproval action under CWA section 303(c); or (2) whether a given provision should be approved or disapproved under CWA section 303(c). While the CWA and EPA's regulations provide tests for reviewing water quality criteria, the United States is unsure how or whether the Opinion and Order directs EPA to apply those to its review of Oregon's nonpoint source provisions, which EPA previously has not reviewed. Accordingly, the United States also respectfully seeks the Court's clarification of that issue.

In order to be consistent with the CWA, a water quality criterion must protect the designated beneficial use. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.6(c), 131.11(a). The criterion also must be "based on sound scientific rationale." 40 C.F.R. § 131.11(a). This test applies, for example, to generally applicable numeric pollutant criteria.<sup>9</sup> In addition, for provisions such as the "recurring activities" nonpoint source provision, which is related to antidegradation of "Tier 2" waters, EPA's antidegradation regulation provides, *inter alia*, that the water quality "shall be maintained and protected unless the State finds . . . that allowing lower water quality is necessary to accommodate

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<sup>9</sup> With respect to "mixing zones," EPA examines whether allowing the applicable criteria to be exceeded within a geographically-limited area still would allow the designated use to be protected on the water body as a whole.

important economic or social development in the area in which the waters are located.” 40 C.F.R. § 131.12(a)(2).

The Opinion and Order appears to set forth several descriptions of the test under which the Court may be directing EPA to review the nonpoint source provisions. For example, the Opinion and Order states that “the challenged provisions could present a considerable obstacle to the attainment of water quality standards . . . .” Opinion and Order at 13. *See also* Opinion and Order at 14 (the nonpoint source provisions “clearly have the potential to interfere with the attainment of water quality standards . . . .”); 15 (“it would undermine the purposes of the Act to not require a review of provisions promulgated that may enable or disable the attainment of [water quality criteria]”); 16-17 (stating that in *Pronsolino v. Nastri*, 291 F.3d 1123, 1132 (9<sup>th</sup> Cir. 2002), the Ninth Circuit “observed that the EPA’s regulations focused on the attainment of water quality standards regardless of the source of pollution.”). The Opinion and Order also states that the CWA “must . . . require a review of new or revised regulations that affect whether and how those standards are applied,” and that “EPA should have reviewed the ‘actual effect’ of the challenged nonpoint source provisions.” *Id.* at 14-15, 16. In addition, as discussed above, the Opinion and Order referred to the exercise of EPA’s duty to review the nonpoint source provisions “insofar as the provisions affect how, whether and when [Oregon’s water quality] standards apply to bodies of water polluted by nonpoint sources,” and stated that EPA was required to “review the effects of [the nonpoint source] provisions to ensure that they do not supplant, delay the implementation of, or in some other way undermine the application of Oregon’s standards to the state’s waterbodies.” *Id.* at 17. Finally, in the penultimate paragraph of the discussion of the nonpoint source provisions, the Opinion and Order states that “EPA is required to . . . decide if Oregon’s nonpoint source provisions are lawful.” *Id.* at 18.

Because the United States is unsure whether the Opinion and Order requires EPA to assess Oregon’s nonpoint source provisions under one or more of the tests discussed in the preceding paragraph, or under another test(s), the United States respectfully requests that the Court clarify that issue.

III. Does the Opinion and Order Require EPA to Take an Approval or Disapproval Action Under CWA Section 303(c) on Oregon's Internal Management Directive?

In addressing Plaintiff's challenge regarding Oregon's Internal Management Directive ("IMD"), which sets forth Oregon's methods for implementing its antidegradation policy, the Opinion and Order discusses the reviews that EPA undertakes of such methods. Opinion and Order at 33. EPA's "review" differs based on whether the state elects to include its methods in its water quality standards. If so, then the methods constitute water quality standards under the CWA and EPA's regulations, and the state must submit those methods for EPA's review and approval or disapproval under CWA section 303(c). Opinion and Order at 33. *See* U.S. Br. at 46-47; U.S. Reply at 38-39; 33 U.S.C. § 1313(c)(3). If, instead, the state elects to merely "identify" its methods (as set forth in 40 C.F.R. § 131.12(a)) without including the methods in its water quality standards ( *e.g.*, if the state elects to include the methods in non-binding form such as a guidance document), then neither the CWA nor EPA's regulations require EPA to approve or disapprove those methods under CWA section 303(c). Opinion and Order at 33. *See* U.S. Br. at 46-47; U.S. Reply at 38-39; 33 U.S.C. § 1313(c); 40 C.F.R. § 131.12(a). Nonetheless, in that situation, EPA often reviews and considers a state's methods to help it understand how the state's antidegradation policy (new or revised versions of which EPA must approve or disapprove under CWA section 303(c)) will be implemented to ensure, for example, that the state's antidegradation policy will not be circumvented. Opinion and Order at 33. *See* U.S. Br. at 46-47; U.S. Reply at 38-39; 33 U.S.C. § 1313(c); 40 C.F.R. § 131.12(a).

With that background, the ruling in the Opinion and Order regarding the IMD provided as follows:

The court concludes that the EPA was required to review the IMD to ensure that it describes the required elements and complies with federal regulations such that it does not circumvent the purpose of the antidegradation policy. Accordingly, summary judgment on the Tenth Claim for Relief is granted in favor of Plaintiff.

Opinion and Order at 33. The ruling did not mention any requirement that EPA take approval or disapproval action on the IMD under CWA section 303(c). Nor did the Tenth Claim for Relief in the Second Amended Complaint. Instead, that claim challenged EPA's supposed approval of the

IMD under CWA section 303(c) but, as the Opinion and Order recognized, EPA only took such approval action on those portions of the IMD that Oregon expressly incorporated into its water quality standards. Opinion and Order at 32-33. *See* U.S. Br. at 46-47; U.S. Reply at 37-40. Further, Plaintiff's challenges to EPA's supposed section 303(c) approval of the IMD did not relate to the portions of the IMD that Oregon incorporated into its standards. U.S. Br. at 46 n.46; U.S. Reply at 40 n.55. As a result, much of the parties' briefing focused on whether EPA was required to "review" the portions of the IMD that Oregon did not incorporate into its water quality standards. *See, e.g.*, U.S. Br. at 46-47; U.S. Reply at 38-40.

Accordingly, the United States interprets this portion of the Opinion and Order: (1) to require EPA to review those portions of the IMD that were not expressly incorporated into Oregon's water quality standards (and which EPA, therefore, did not previously review and approve under CWA section 303(c)), under the standard set forth by the Court (that is, "to ensure that [the IMD] describes the required elements and complies with federal regulations such that it does not circumvent the purpose of the antidegradation policy"); but (2) not to require EPA to approve or disapprove those portions of the IMD under CWA section 303(c). The United States respectfully requests that the Court clarify whether this interpretation of the Opinion and Order is correct.

### CONCLUSION

For the foregoing reasons, the United States' Motion for Clarification should be granted.

Respectfully submitted,

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Dated: March 30, 2012

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 30, 2012, I caused a true copy of the foregoing UNITED STATES' MEMORANDUM IN SUPPORT OF UNITED STATES' MOTION FOR CLARIFICATION to be served on each of the following counsel in the manner indicated below:

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